IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2004

CORAM

THE HONOURABLE MR JUSTICE N.DHINAKAR

and

THE HONOURABLE MR JUSTICE N.KANNADASAN

Criminal Appeal Nos. 1863 of 2002 and 1816 of 2003

A.Babu @ Raj ... Appellant in C.A.No.1863/2002/ Accused 3.

Murugan ... Appellant in C.A.No.1816/2003/ Accused 1

Vs

State, rep. by Inspector of Police, Paramathi Police Station, Namakkal District. (Cr. No.197 of 2000) ... Respondent in both the appeals.

Prayer: Appeals against the judgment passed by the learned Additional District Sessions Judge cum Chief Judicial Magistrate, Namakkal, in S.C.No. 128 of 2002 dated 29.11.2002.

For Appellant in C.A.No.1863/02 : Mr.V.K.Muthusamy, S.C. for M/s.K.Kalyanasundaram

For Appellant in C.A.No.1816/03 : Mr.S.M.Deenadhayalan

For Respondent : Mr.V.M.R.Rajendran Addl. Public Prosecutor. In both Crl Appeals

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J U D G M E N T

(Judgment of the Court was delivered by N.DHINAKAR,. J)

The appellant in C.A.No.1863 of 2002 is A-3 and the appellant in C.A.No.1816 of 2003 is A-1 in Sessions Case No.128 of 2002. The appellants in the above two appeals were tried along with three others in the said sessions case. In this judgment, the appellant in C.A.No.1816 of 2003 and the appellant in C.A.No.1863 of 2002 will be referred as A-1 and A-3 and the other accused, who were tried along with the appellants, will be referred as A-2, A-4, and A-5 in the same order as they were arrayed before the learned sessions Judge for the sake of convenience. The above two appeals are disposed of by the following common judgment, as they arise out of a single sessions case.

2. The accused, A-1 to A-5 (including the two appellants) were tried under Sections 394, 395 and 395 read with 397 I.P.C. The learned Sessions Judge, while acquitting the fifth accused, convicted A-1 to A-4 and sentenced each one of them to imprisonment for life for the offence under Section 394 I.P.C. and also directed each one of them to pay a fine of Rs.1,000/- with a default sentence of six months R.I. for the said offence. A-1 to A-4 were also convicted under Section 392 read with 397 I.P.C., for which, each one of them was sentenced to ten years rigorous imprisonment and also directed to pay a fine of Rs.1,000/- with a default sentence of six months R.I. By the present appeals, A-1 and A-3 challenge their conviction and sentence.

3. The case of the prosecution is this:

P.Ws.1, 3 and 4 were working as employees in a petrol bunk belonging to Petrol Bunk Lorry and Trailer Owners and Drivers Association at Keerampur village. On the date of incident, P.Ws.1 and 4 were working as cashiers in the said petrol bunk and P.W.3 was working in the petrol bunk for filling the tanker lorries with diesel. The normal working hours of the petrol bunk for the employees is 24 hours, i.e., from 9.00 a.m. to 9.00 a.m. and accordingly, on 28.11.2000 at 9.00 a.m., P.Ws.1, 3 and 4 came to the petrol bunk in connection with their work.

4. At about 7.00 p.m. on 28.11.2000, the cash collected for the day was taken away by P.W.6, the supervisor from the association. After 7.00 p.m., a sum of Rs.1,21,352/- was collected towards the sale of petrol and diesel. The said amount was kept in the bureau, which was inside a room and a sum of Rs.9,000/- was kept in a drawer in the table, which was in the office room. At about 4.30 a.m., P.Ws.1, 3, 4 and two others were sitting outside and talking among themselves. At that time, four persons (A-1 to A-4)

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entered the petrol bunk. Each of them was armed with a knife. A-1 threatened the witnesses to hand over the amount. P.W.1 handed over Rs.9,000/-, which was kept in the drawer. A-1 asked for the keys of the bureau and P.W.1 told him that he has no keys with him. Thereafter, all the four accused pushed the witnesses inside the room and broke open the doors of the bureau with a patta knife. Thereafter, a sum of Rs.1,21,352/-, kept in the bureau, was taken by the accused. After taking the amount, they were going out of the petrol bunk. P.W.1, at that time, raised alarm and A-1 cut P.W.1 and when it was warded off, P.W.1 suffered an injury on the left ring finger. Thereafter, all the four accused came out, got into an Ambassador car and went away. The witnesses could not notice the registration number of the car and the whole operation lasted for about ten minutes. At the time of occurrence, lights were burning inside as well as outside the petrol bunk. Immediately, P.W.1 informed the office bearers of the association over phone. They reached the petrol bunk and later, P.W.1 proceeded to the police station at Paramathi, where he gave a complaint to P.W.11, the Circle Inspector of Police, at 7.30 a.m. P.W.11, on the basis of the complaint given by P.W.1, registered a case in Crime No.197 of 2000 against unknown accused under Section 394 I.P.C. Ex.P.6 is a copy of the printed first information report. As P.W.1 had an injury, he was referred to the doctor for treatment.

5. On being referred, P.W.5 examined P.W.1 and found two injuries, which are as follows:

1. Lacerated injury on the left ring finger 1 cm. No bleeding.
2. Lacerated injury on the left little finger 2 cm. near nail bed.

Ex.P.4 is the wound certificate issued by the doctor.

6. P.W.11 proceeded to the scene of occurrence and prepared an observation mahazar, Ex.P.5 and drew a rough sketch, Ex.P.7. He questioned witnesses and recorded their statements. On 30.11.2000, he examined some more witnesses and recorded their statements. In the meantime, P.W.10, the Inspector of Palayamkottai police station, was investigating Crime No.98 of 2001 registered at Perumalpuram police station, Tirunelveli District, which was registered for an offence under Section 395 I.P.C. He was standing with his police party near Ram theatre and checking all the vehicles near a check post. He saw an ambassador car bearing Registration No.TTS-5052 coming towards the check post following by a TVS-Suzuki with the registration No.TN-37-W-3486. Two persons were travelling in the said TVS-Suzuki and all the five accused were travelling in the car. P.W.10 checked the car and A-1 was found having a country made pistol in his waist and he was also found in possession of three cartridges. A-2 was carrying a country made pistol and two

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cartridges. When the vehicle was searched, the officer found knives in the shape of aruvals and six country made bombs. All the accused including the two persons, who came by TVS-Suzuki, were questioned and their statements were recorded. Thereafter, an information was given to P.W.11 about the arrest of A-1 to A-5.

7. P.W.11, on receiving the information about the arrest of A-1 to A-5, proceeded to Perumalpuram police station, where P.W.1 identified A-1 to A-4. The statement of P.W.1 was recorded. P.W.11 also recorded the statement of other witnesses. When A-1 was questioned, he gave a statement and in pursuance of the statement, he pointed P.W.9, whose statement was recorded. The material objects, which were seized during investigation, were sent to Court and after the completion of investigation, the final report was filed against the accused.

8. The accused were questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against them. They denied all the incriminating circumstances. They have stated that they have taken from the house and a false case had been foisted upon them.

9. The learned counsel appearing for the appellant in C.A.No.1863/02 and for the appellant in C.A.No. 1816/03, who are A-3 and A-1 respectively, submit that in the absence of a test identification parade, the identification of the appellants in Court is not sufficient and the appellants are entitled for the benefit of doubt. It was further submitted that even if the entire facts are taken to be true, the offence committed by the appellants will fall under Section 392 read with 397 I.P.C. and the learned Sessions Judge erred in convicting them under Section 394 I.P.C. On the above contentions, we have heard the learned Additional Public Prosecutor and perused the entire recorded evidence.

10. It is not in dispute that P.Ws.1, 3 and 4 were working in the petrol bunk belonging to Petrol Bunk Lorry and Trailer Owners and Drivers Association. It is also not in dispute that on 28.11.2000, P.Ws.1, 3 and 4 went to the petrol bunk to do their duty from 9.00 a.m. till 9.00 a.m. on the next day. It is the evidence of P.W.1, who is the cashier, that at about 7.00 p.m., the amount collected at the petrol bunk, was taken away by the office bearers of the association and thereafter, a sum of Rs.1,21,352/- was collected and it was kept in a bureau. According to him, a sum of Rs.9,000/- was left in the drawer of a table, which was in the office room. It is the evidence of P.Ws.1, 3 and 4 that at about 4.30 a.m., when they were sitting outside the petrol bunk and talking, the four accused entered the petrol bunk, threatened the witnesses and thereafter, the amount of Rs.9,000/- kept in the drawer was given to the first accused and that the first accused asked for the keys of the bureau. P.W.1 told him that he had no

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keys with him. According to the witnesses, the accused pushed all the three witnesses and two other employees inside the room and thereafter, broke open the doors of the steel almirah and committed theft of Rs.1,21,352/-. The evidence further discloses that when the accused were leaving the petrol bunk, P.W.1 raised alarm and the first accused cut P.W.1 and that when he warded off the said attack, he suffered an injury. The evidence of P.W.1 is supported by P.W.5, the doctor who examined him and found two injuries, for which he issued Ex.P.4, the wound certificate. The evidence also discloses that there were bright lights burning inside as well as outside the petrol bunk and the witnesses were able to identify the accused at the time of occurrence. On going through the evidence of P.Ws.1, 3 and 4, we are fully satisfied that the occurrence had taken place in the manner spoken to by them and on the early hours of 29.11.2000, theft was committed at the petrol bunk by the accused.

11. It is, no doubt, true that no test identification parade was conducted. But, it is not in dispute that all the accused were identified in Court by the witnesses. In DANA YADAV v. STATE OF BIHAR [(2002) 7 SCC 295], the Supreme Court, while considering the probative value of the test identification parade, held that the evidence regarding the identification in Court does not become inadmissible and cannot be discarded on the ground of not being preceded by a test identification parade, when the Court finds the same to be trustworthy. The Supreme Court further held that the identification of an accused by a witness in Court is substantive evidence whereas the evidence of identification in the test identification parade is though a primary evidence, it is not a substantive one and the same can be used only to corroborate identification of the accused by a witness in Court. The law laid down by the Supreme Court, therefore, clearly shows that even if there had been no test identification parade, the case of the prosecution cannot be thrown out, if the Court is satisfied about the trustworthiness of the witnesses and if the witnesses are able to identify the accused for the first time in Court, their evidence regarding the test identification parade does not become inadmissible and cannot be discarded on the ground that there was no test identification parade earlier.

12. The prosecution, though came out with a version that a gold chain was recovered from the first accused and the same was purchased from P.W.9 with the amount stolen from the petrol bunk, the trial Court disbelieved the same on account of inherent contradictions noted in the evidence. On going through the reasons given by the learned trial Judge, we also find that not much reliance can be placed upon the recovery of the gold chain and even if the recovery of the gold chain is to be accepted, it will not show that the said gold chain weighing about 9.8 grams was purchased with the money stolen from the petrol bunk; but the evidence of the witnesses clearly establish that all the four accused entered the

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petrol bunk, committed theft of cash and while leaving the place, when P.W.1 raised alarm, A-1 caused injury to P.W.1 and thereafter, all the accused fled.

13. The learned counsel for the first accused submits that even if the entire facts are taken to be true, the offence committed by the first accused will fall under Section 392 read with 397 I.P.C. and it will not attract the penal provision of Section 394 I.P.C. We will now take up the said contention and find out the nature of offence committed by the first accused. Robbery is defined under Section 390 I.P.C. and it states that in all robbery there is either theft or extortion. It further contemplates as to when theft becomes robbery by defining that theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end (emphasis supplied), voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. The definition, therefore, shows that theft becomes robbery if the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint for the purpose of committing any of the following acts:

1) in order to commit theft,
2) in committing theft,
3) in carrying away the property obtained by way of theft, or
4) in attempting to carry away the property obtained by theft.

The facts, which we have extracted above, therefore, show that the act committed by the first accused will attract the third part of Section 390 I.P.C., since, according to P.W.1, while the first accused and the other accused were running away with the property and when P.W.1 raised alarm, he was cut. This means that the injury was caused on P.W.1 when A-1 along with the other accused was carrying away the property obtained by theft. Section 392 I.P.C. provides punishment for robbery and Section 394 I.P.C. is the aggravated form of robbery, since Section 394 I.P.C. reads as follows:

> "If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

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The above reading of Section 394 I.P.C. shows that a person, to be convicted under Section 394 I.P.C., should cause voluntarily hurt while committing or attempting to commit robbery. That is, the purpose of causing hurt under Section 394 I.P.C. is to commit robbery or attempt to commit robbery. The words 'for that end' occurring in the definition for Robbery indicates that if the hurt is caused while carrying away the property, the offender, who causes the hurt for the purpose of carrying away the property will be liable for punishment under Section 392 I.P.C., since the injury is caused for the purpose of carrying away the property in view of the said words 'for that end' used in that Section. In this case, the first accused caused hurt not to commit robbery, but caused hurt for carrying away the property obtained by theft and therefore, the offence committed by the first accused will fall under Section 392 read with 397 I.P.C. Therefore, the conviction of the first accused under Section 394 I.P.C. is to be set aside and instead, he is to be convicted under Section 392 read with 397 I.P.C. and accordingly, he is convicted under Section 392 read with 397 I.P.C. and for the said conviction, he is sentenced to ten years rigorous imprisonment.

14. As A-3, who is the appellant in Crl.A.No.1863 of 2002, shared the common intention of the first accused and committed robbery and therefore, his conviction under Section 394 I.P.C. is set aside and instead, he is convicted under Section 392 read with 34 I.P.C., for which, he is sentenced to rigorous imprisonment for a period of ten years.

15. In the result, the conviction of A-1 and A-3, who are the appellants in C.A.Nos.1816 of 2003 and 1863 of 2002, under Section 394 I.P.C. is altered to one under Section 392 read with 397 I.P.C. and 392 read with 34 I.P.C. respectively, and for the said offence, each one of them is sentenced to undergo rigorous imprisonment for a period of ten years. In other respects including the fine amount, the judgment of the learned Sessions Judge will stand. The appeal is dismissed with the above modification in conviction and sentence.

sra

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Additional District and Sessions Judge cum Chief Judicial Magistrate, Namakkal District.
2.-do- Thro' The Principal Sessions Judge, Namakkal District.
3.The District Collector, Namakkal.
4.The Director General of Police, Chennai.
5.The Superintendent, Central Prison, Coimbatore.
6.The Inspector of Police, Paramathi Police Station, Namakkal District.
7.The Public Prosecutor, High Court, Madras.

+ 1 cc to Mr.S.M.Deenadhayalan, Advocate in SR No.55886

+ 1 cc to Mr.K.Kalyanasundaram, Advocate in SR No.55941

Crl.A.Nos.1863 of 2002
and 1816 of 2003

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